BOOK REVIEWS

The Federal Power over Carriers and Corporations. By E. PARMALEE PRENTICE. New York and London: The Macmillan Company, 1907. 8vo, pp. xii+244.

This book is obviously, though not very frankly, a brief for those interested in denying to the federal government the constitutional power to regulate and control large corporations engaged in interstate transportation or trading. The author argues that at the time the Constitution was adopted the grant of power to Congress to regulate commerce with foreign nations among the several states, and with the Indian tribes was meant, as regards interstate transportation, to give only the power of regulating carriage by water, because, at the time, interstate carriage by land was utterly insignificant and could not have been in the minds of those adopting the Constitution as needing national regulation. Also, prior to 1824 when *Gibbons v. Ogden* was decided, a large number of stage monopolies over certain roads and between certain points had been granted by the states without protest, although over some of these routes goods must have been carried from state to state; and many exclusive grants of ferriage had been granted across waters separating two states. He quotes from contemporaneous writings and congressional debates various opinions to the effect that Congress could not authorize or regulate land carriage within a state, and contends that the broad language of Marshall in *Gibbons v. Ogden* was not meant by him literally, but only as applied to navigation (pp. 70–98). He also thinks that the present decisions upon the subject of interstate commerce "go to the limit of federal power, and extension of present rules" (as by upholding federal interstate rate-making) "would be embarrassed by extraordinary constitutional difficulties" (pp. 136–37). Federal power to license or incorporate corporations for interstate trading is denied, and doubts are expressed whether Congress can really charter a railway empowered to do interstate carrying against the will of any state in which it operated (pp. 149–55). The Sherman anti-trust law is disapproved as an improper and unnecessary interference with matters that should be left to state regulation.

As a brief for one side of a controversy the book might pass without much criticism, but as an effort fairly to state the power Congress now probably possesses over carriers and corporations it lacks either ingenuousness or care. For instance, the gloss put upon Marshall's opinion in *Gibbons v. Ogden* seems quite impermissible when the exact words of the judge are read:

> It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend. . . . . If this be the admitted meaning of the word in its application to foreign nations, it must carry the *same meaning* throughout the sentence and remain a unit, unless there be some plain intelligible cause which alters it. (9 Wheat. 193–94.)
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> The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several states. The sense of the nation on this subject is unequivocally manifested by the provisions made in the laws *for transporting goods by land* between Baltimore and Providence, between New York and Philadelphia, and between Philadelphia and Baltimore. (9 Wheat. 196.)

Yet Mr. Prentice says of this case that the decision, "without reference to transportation, held that the federal power over commerce included control of navigation" (p. 75).

As regards the state stage and ferry monopolies of the first third of the nineteenth century, their existence, even if legal, was in no wise inconsistent with a *concurrent* power of the United States to regulate them with reference to interstate commerce. *Gibbons v. Ogden* itself was expressly based upon the inconsistency of the New York monopoly with an act of Congress, Marshall refusing to discuss the question of its invalidity on any other ground. Five years later he admitted the concurrent power of a state to obstruct a navigable tidal stream until Congress controlled such action (*Willson v. Blackbird Creek Marsh Co.*, 2 Pet. 245). There is no reason to believe it would have been held at this time that the power of Congress over interstate land transportation was not at least concurrent with the states. With respect to interstate ferries it is true that up to the time of the Civil War there were dicta in the federal courts declaring the power to establish and regulate such ferries was reserved to the states. This Mr. Prentice emphasizes (p. 130). He does not see fit, however, to mention at all that since then the Supreme Court has declared this power to be con-

currently in the United States (*Gloucester Ferry Co. v. Pa.*, 114 U. S. at 215–17; *Covington Bridge Co. v. Ky.*, 154 U. S. at 211), and that within three years it has expressly reserved the right to redecide whether the states may regulate such ferries at all (*St. Clair Co. v. Interstate Transfer Co.*, 192 U. S. 454, 470 [1904]).

In the discussion of present-day questions also the book is markedly biased in presenting the evidence for one side only, much of this consisting of quotations from partisan speeches in Congress and from dissenting opinions of the Supreme Court, the fact of dissent not being always indicated. For instance, in the discussion of the federal power to charter interstate railways the author endeavors to throw doubt upon its existence, without citing or quoting from cases like *California v. Central Pacific R. R. Co.* (127 U. S.), where it is strongly affirmed. The argument against federal power to license or incorporate corporations to do interstate commerce appears to attribute to the author's opponents the claim that Congress can arbitrarily deny to any individual or combination of individuals the right to do interstate commerce (see pp. 87, 217, 219, 226). Of course, no such claim is made, and Mr. Prentice disregards the real point at issue in order to attack his man of straw. The argument which the author does *not* answer runs thus:

The Fourteenth Amendment prohibits a state from depriving any person of property or liberty without due process of law, yet it has always been held that a state may forbid a corporation, foreign or domestic, from doing internal commerce of no matter how innocent a nature, wthin its borders. It could not do this to a natural person. This is because the right of a corporation to act is a franchise which may be granted or refused at pleasure by the sovereignty having jurisdiction over the class of acts in question. If a particular sovereignty does not indicate its dissent, it is assumed to assent to acts done in it by a corporation, on the grounds made familiar in *Bank of Augusta v. Earle* (13 Pet. 519). But it may withdraw this consent at any time, unless it has validly contracted not to do so. If the corporate acts consist in doing interstate commerce, such acts are within the jurisdiction of Congress, and the franchise to do them may be controlled by Congress. So long as it does not deny the right, its assent is presumed, but it may expressly withdraw this consent, and regrant it on terms, as by a license. That the franchise of a corporation to do interstate commerce is subject to the jurisdiction of Congress appears negatively in the decisions

which forbid a state to deny its exercise to a foreign corporation, whose other franchises, however, may not be exercised within a hostile state. If Congress cannot forbid the exercise of this franchise, no one can, and we have, consequent upon the formation of the Union, the curious disappearance of a valuable and much-used governmental power, though there is nothing in the Constitution that expressly or by necessary implication denies the power either to the states or the United States. The Fifth Amendment certainly does not, for it is in the same language as the Fourteenth, and the denial of it to the states has been based upon that interpretation of the commerce clause which reserves to Congress exclusively such regulation of the subject as ought to be uniform throughout the country. Hence the deduction is irresistible that Congress has the same power over a corporate franchise to do interstate commerce, no matter by whom granted, that a state has over a franchise to do internal commerce, no matter by whom granted; and, likewise, congressional power to forbid an individual's doing interstate commerce, is limited by the Fifth Amendment as state power is by the Fourteenth.

The only suggestion in Mr. Prentice's book that appears germane to this argument is that "the right to engage in commerce is part of the liberty derived from the states, which neither the United States nor the states may deny" (p. 34). This entirely disregards the patent fact that the right to act *in corporate form* is not derived from any constitutional guaranty of liberty, whatever, but solely from a franchise permitted to be exercised by the appropriate sovereignty, and, as has just been said by the Supreme Court, the liberty referred to in the Constitution is the liberty of natural, not of artificial, persons (*Northwestern Ins. Co. v. Riggs,* 203 U. S. at 255 [December, 1906]). Moreover, if Mr. Prentice is right, why is not corporate liberty to engage in internal commerce equally protected against *state* prohibition?

The weakness of the author's too frequent reliance upon debates in Congress to support his constitutional views is amusingly shown in one place. At p. 149 he quotes confidently from a House report made in the spring of 1906 to the effect that Congress has no visitatorial power over corporations created by a state. About the same time (March), in a decision not cited by Mr. Prentice, the Supreme Court asserted that state corporate franchises to do interstate commerce must be exercised in subordination to the power of

Congress to regulate such commerce, and, in respect to this, the general government might exert the same *sovereign authority* to ascertain whether the corporation was exercising its franchise in obedience to the laws of the United States as the state would have regarding its own laws, or as the United States would have *if the corporation had been created by act of Congress* (*Hale v. Henkel,* 201 U. S. at 75).

Where the book deals with matters not at present the subject of sharp controversy the author is both acute and fair, as in his discussion of the taxation of imports and exports (pp. 37–48), his review of the decisions from 1824 to 1851 (pp. 101–20), and in his analysis of the consequences flowing from the construction placed upon the commerce clause in *Brown v. Maryland.* On the whole, however, it must be said that the book's place is as a readable partisan account of the development of a constitutional doctrine, and not as a serious contribution to the legal literature of the subject.

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The Labor Movement in Australasia: A Study in Social-Democracy. By VICTOR S. CLARK. New York: Henry Holt & Co. 8vo, pp. xi+327.

Dr. Clark's account of the Social Democratic labor movement in Australasia presents a simple statement of those conditions past and present which have developed peculiar social institutions in this remote region. The Australasians have had unique economic problems to solve, and in solving them have developed institutions which may properly be characterized as socialistic, but the development of these institutions has been in no respect consciously modified to conform to any social philosophy. In their social conduct the Australasians have been pragmatists and opportunists, content to work out results in the world of affairs—to solve each problem in the light of immediate experience. In no line of development have they sought consistently to carry out any general principle. The state, because it could borrow money on better terms than private corporations in the early days, has built and operated railways, but it has not prevented private capital from entering this field of investment. It has provided state insurance, but has not prohibited private insurance companies from operating in competition with the govern-